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Decision 01-12-021 December 11, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The Office of Ratepayer Advocates, Complainant, vs. Pacific Bell Telephone Company (U 1001 C), Defendant.	Case 00-11-018 (Filed November 9, 2000)

Nelsonya Causby, Attorney at Law, for Pacific Bell Telephone Company, defendant.
Laura J. Tudisco, Attorney at Law, for the Office of Ratepayer Advocates.

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OPINION GRANTING COMPLAINT, IN PART

I. Summary

Complainant Office of Ratepayer Advocates (ORA) alleges that Pacific Bell Telephone Company's (Pacific) residential repair intervals violate various statutes and an order of this Commission. We find that the 45% increase in the average number of hours to restore dial tone service to residential customers over the period 1996 – 2000 violates § 451[1] because residential customers are not receiving repair service that is "adequate, efficient, just, and reasonable."

Also, we find that Pacific's increase between 1996 and 2000 in the mean time to restore service to residential customers violates Ordering Paragraph (OP) 2 of Decision (D.) 97-03-067, which requires Pacific to "maintain or improve its service quality over the five years following the merger" of Pacific with SBC Communications, Inc. (SBC). In violating OP 2, Pacific also violates § 702.

Further, we find that Pacific's failure to expressly notify customers when they call its 611 repair service of the availability of a four-hour appointment window violates § 451 in that it does not "promote the safety, health, comfort and convenience of its patrons…and the public."

To remedy these violations, we direct the following actions: First, Pacific must meet the repair standards for initial and repeat out-of-service repair intervals established herein on an annual basis. In any calendar year in which Pacific fails to meet either of our adopted standards, Pacific will pay a penalty in the amount of $300,000 for each month of the year in which it fails to meet that

[1] Unless otherwise specified, all section cites refer to the Public Utilities Code.

particular standard.[2] (The standards set are an annual average of 29.3 hours for Pacific's initial out-of-service repair interval and 39.4 hours for its repeat out-of-service repair interval. The standards reflect data reported by Pacific for 1996, the last full calendar year before the merger with SBC.) Second, Pacific must change its automated Interactive Voice Response (IVR) system that customers reach when they call Pacific's 611 repair service to alert customers of the availability of a four-hour appointment window.

II. Allegations of the Complaint

ORA alleges (and Pacific denies) that Pacific's residential repair service violates the following statutes and a Commission order:

- Pacific's long repair intervals violate § 451, which requires Pacific to furnish "…adequate, efficient, just, and reasonable service…" as is "…necessary to promote the safety, health, comfort and convenience of its patrons…and the public."
- Pacific's failure to provide customers with an opportunity to request a four-hour appointment period violates § 451.
- Pacific's long repair intervals and high customer dissatisfaction levels, since its merger with SBC, violate OP 2 of D.97-03-067, and thus also violate § 702.

III. Remedies Requested

In its Complaint, ORA requests that the Commission adopt the following remedies:

- Order Pacific to provide customers with guarantees of quality repair service within a

[2] The penalty mechanism is calculated on a monthly basis for each standard.

specified time, and amend its tariff to include that guarantee;

- Order Pacific to provide customers with a credit in an amount to be determined if Pacific fails to meet repair service guarantees, and amend its tariff to include that credit;
- Establish a penalty mechanism if Pacific fails to meet repair service guarantees;
- Order Pacific to provide customers who call Pacific for repairs with an opportunity to request a four-hour appointment period, and amend its tariff to include a four-hour appointment period;
- Order an audit of Pacific's records to determine if it is in compliance with General Order (GO) 133-B requirements that it provide the Commission all initial reports from customers relating to dissatisfaction with Pacific's repair service; and
- Order any further relief the Commission deems appropriate.

In its Opening Brief, ORA made some modifications to its list and proposed the following additional procedures and reports: (1) order workshops to develop out-of-service repair intervals and to establish the appropriate compensation to be paid to customers for failure to meet them; (2) order Pacific to provide ORA with raw data on residential repair intervals in hours on a quarterly basis; (3) order an audit of Pacific's 611 operations as they relate to the way in which Pacific records, tracks, and reports calls; (4) order Pacific to record the complaints it receives about its residential repair service and maintain those records for at least three years; and (5) on a quarterly basis, provide ORA with all customer complaints Pacific has received regarding its residential repair service.

Pacific objects to ORA adding these new remedies in its Opening Brief, leaving Pacific no opportunity to provide factual evidence rebutting the basis of

the new remedies. Pacific sees the amended request for new types of relief as a blatant violation of Rule 10 of our Rules of Practice and Procedure. The pertinent part of Rule 10 reads as follows:

> The complaint shall be so drawn as to completely advise the defendant and the Commission of the facts constituting the grounds of the complaint, the injury complained of, *and the exact relief which is desired.* (Emphasis added.)

We agree that ORA's request at the briefing stage for workshops and an audit ((1) and (3) above) can and should have been made earlier. On the other hand, (2), (4), and (5) are more in the nature of data requests than "relief" within the meaning of Rule 10. In any event, in this decision we do order such monitoring and reporting as are necessary to ensure Pacific's compliance with our order, and ORA will receive those monitoring reports. Also, we remind Pacific and ORA that § 309.5 authorizes ORA to obtain any information it deems necessary to perform its duties from utilities regulated by the Commission; ORA does not need either an order from the Commission or a particular on-going proceeding as a pre-condition to obtaining information from Pacific.

IV. Procedural Background

We go into some detail regarding the procedural background in order to address an important threshold issue, namely, Pacific's challenge to ORA's standing to file its complaint.

On December 19, 2000, Pacific filed a motion to dismiss the complaint and a request for judicial notice of its GO 133-B reports. Pacific's motion to dismiss and judicial notice request were denied by Administrative Law Judge (ALJ) Ruling dated January 12, 2001. The case then proceeded to hearing (May 15-17, 2001), and was submitted on July 5, 2001, concurrent with the completion of briefing.

In its motion to dismiss Pacific claims that ORA lacks standing to file a complaint before the Commission.[3] Pacific cites §§ 1702 and 309.5 in support of its position. For the reasons discussed below, we reject Pacific's argument and affirm the ALJ's denial of the motion.

Section 309.5(a) provides that there is "within the commission a division to represent the interests of public utility customers and subscribers in commission proceedings. The goal of the division shall be to obtain the lowest possible rate for service consistent with reliable and safe service levels." ORA is the Commission division charged by § 309.5 with these responsibilities.

Pacific does not dispute that ORA may participate in Commission proceedings such as applications initiated by a utility, investigations initiated by the Commission, and complaint proceedings initiated by a third party. The issue here is whether ORA has standing to initiate a complaint against a utility.

Nothing in § 309.5 denies ORA standing to initiate a complaint. To the contrary, the plain language of § 309.5 (*i.e.*, the term "represent") seems to encompass ORA initiating a complaint against a utility in order to represent the interests of public utility customers. To read this statute otherwise would deprive ORA of a fundamental tool to represent these interests. It would relegate ORA to a merely reactive role, with the ability to respond to a utility proposal, or to participate in another person's complaint or a Commission investigation, but would not permit ORA to initiate a complaint on behalf of the very interests it is charged to represent. We find that this narrow reading of the

[3] Pacific's motion to dismiss also raised the issue that ORA failed to allege facts sufficient to support its claims. The ALJ found that ORA's complaint is legally sufficient and denied the motion in the January 12, 2001 Ruling.

scope of ORA's ability to represent the interests of customers is inconsistent with the letter of the statute and would tie ORA's hands in carrying out its specific mandate.

Pacific next argues that § 1702 also precludes ORA from initiating a complaint. Section 1702 provides, in relevant part,

> "Complaint may be made by the commission of its own motion or by any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization, or any body politic or municipal corporation, by written petition or complaint, …"

Pacific states that because ORA is not the Commission, nor any of the other people or entities defined by § 1702, it does not have standing to file this complaint. We disagree. Section 1702 authorizes complaints to be made by any "person," a term that is certainly broad enough to include a utility's ratepayers, and thus, ORA as the statutorily designated representative of those ratepayers.

Section 1702, when read together with § 309.5, cannot reasonably be construed to bar ORA from filing a complaint before the Commission. To read these sections as doing so appears contrary to the legislative intent. We therefore conclude that ORA has standing and affirm the ALJ's denial of Pacific's motion. We have reached the same conclusion in another complaint proceeding filed by ORA against Pacific. (*See* D.01-08-067 in C.00-08-053.)

V. Discussion

Under § 1702, a complainant must prove by a preponderance of the evidence that a utility has violated a specific provision of a statute, rule or Commission order, or of a tariff approved by the Commission. In the following sections we analyze the evidence presented on the allegations in ORA's

complaint and find that evidence amply supports our finding of violations essentially as ORA alleges, with one exception.[4]

A. Pacific's Repair Intervals Violate § 451

Section 451 provides, in pertinent part, that:

> Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities…as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

Following are the three issues we need to address to determine that Pacific's increase in repair intervals represents a violation of § 451:

First, we need to determine whether a decline in service quality can constitute a violation of § 451. We note that this is not the first time that we have examined service quality problems in light of the requirements of § 451. We previously determined that a utility's failure to restore service in a timely manner means that the utility is not maintaining a level of "adequate, efficient, just and reasonable service." (*See* D.01-03-029, discussed later.) Also, we need to address Pacific's claims that the Commission has no relevant standard on which to base a finding that Pacific's slow repair service violates § 451.

Second, we need to examine the data presented in the proceeding to see if the data show a violation of § 451. According to data Pacific files with the Federal Communications Commission (FCC), Pacific's average initial repair

[4] We find that the increase in Pacific's customers' dissatisfaction with Pacific's repair service does not violate OP 2 of D.97-03-067.

interval for residential customers increased 45% between 1996 and 2000,[5] from an average of 29.3 hours in 1996 to 42.5 hours in 2000. This hefty increase in the average amount of time Pacific's residential customers are without dial tone while waiting for repairs demonstrates that Pacific fails to meet the requirement of § 451 that service be "adequate, efficient, just and reasonable."

Third, Pacific challenges the data supporting our finding and offers various excuses for the deterioration of the repair intervals between 1996 and 2000. We reject all of those defenses.

These three issues are discussed in detail below.

1. The Increase in Residential Repair Intervals Between 1996 and 2000 Constitutes a Violation of § 451

The threshold issue we must address is whether the Commission can find that a utility's declining quality of service violates § 451. We have examined the quality of a utility's service in the past to make a determination that the degradation of a utility's service violated § 451, and it is appropriate to apply the criteria we adopted there.

Most recently, in D.01-03-029, we examined the effect of layoffs proposed by Pacific Gas and Electric Company (PG&E) and Southern California Edison Company (SCE). The yardstick we used to measure whether we should prohibit the proposed layoffs was whether those layoffs would affect the utilities' obligation "to furnish and maintain adequate, efficient, just and reasonable service, and whether the utilities' actions will affect the safety, service and

[5] In every year since 1996, Pacific's mean time to restore service to residential customers has been higher than the 1996 base year. The mean has fluctuated from year to year, reaching its peak in 1998.

reliability of the electricity system." (D.01-03-029, *mimeo.* at 1.) In other words, we measured the impact those layoffs would have against the specific requirements of § 451.

We looked at various service quality issues, including Transmission & Distribution Business Unit operations, call centers, meter reading, and the number of personnel who could respond to large scale outages. We linked the occurrence of more layoffs to the types of impacts expected to occur:

> Pub. Util. Code § 451 does not just mandate safe and reliable service. In addition, the utility is obligated to furnish and maintain adequate, efficient, just and reasonable service to promote the safety, health, comfort and convenience of its customers. As mentioned in the overview of the utilities' proposed plans, both SCE and PG&E have provided evidence that their layoffs will degrade the level of service in certain areas, including the following: lengthening the time for providing the connections necessary to provide service to new customers; lengthening the time for restoring service in the event of an outage or nonemergency service problem; providing actual meter reads on a bi-monthly basis and estimated usage in the other months; and lengthening the ASA time for the utilities' customer call centers. If more layoffs are allowed to take place, as contemplated by the utilities, this will further erode the ability of the utilities to provide adequate, efficient, just and reasonable service. (D.01-03-029, *mimeo.*, at 32-33.)

In that decision we granted the emergency motion of the Coalition of California Utility Employees, which was seeking to prevent the layoffs of

non-management employees because, among other things, it would affect the ability of the utilities to "timely respond to service calls and outages."

In the instant case, we are not addressing the impact of potential layoffs by the utilities. However, D.01-03-029 clearly shows our intent to evaluate service quality impacts within the context of § 451, and we should do so in this complaint case as well. In that decision we found that a diminution of service quality would constitute service that was not "adequate, efficient, just and reasonable …" as mandated in § 451.

Cost-cutting measures which reduce the ability of call center operations to answer calls, and of field personnel to respond to outages and to restore service in a timely manner, do not maintain a level of adequate, efficient, just and reasonable service. (*Id.* at 33.)

While the March 2001 decision cited above is the most recent decision we have issued in which we found that a decline in service quality constituted a violation of § 451, it is not the only instance. A few years ago, in D.92-08-038, we found that Southern California Gas Company (SoCalGas), in closing 12 branch offices within its service territory, had failed to maintain adequate, just or reasonable service within significant portions of its service territory.[6] SoCalGas was ordered to promptly reopen the 12 offices or to open new branch offices in the 12 communities which would provide an equivalent level of service. While the PG&E/SCE case involved a prospective view that implementing layoffs would lead to a worsening of service quality and therefore a violation of § 451, the SoCalGas case was based on past actions of the utility.

[6] 45 CPUC2d 301,303; D.92-08-038

In both cases cited above, the worsening of service quality was seen as a violation of § 451. We find the evidence in this proceeding demonstrates not merely a prospective but an actual decrease in service quality, which we conclude constitutes a violation of § 451.

Pacific asserts that to evaluate whether a service is efficient, just, and reasonable, there must be a well-known standard for comparison. Pacific suggests there is no such standard here. The evidence is clear, however, that Pacific's repair intervals, based on Pacific's own data submitted to the FCC, have been steadily and significantly deteriorating over a short period of time. Pacific can hardly claim not to have known about the deterioration. The sharp decline in service quality of nearly 50% over a mere four years, coupled with Pacific's knowledge thereof and its lack of any attempt to remedy the deterioration, constitute a violation of § 451.

In its Reply Brief, ORA rebuts Pacific's claim, saying there is one well-known standard for comparison that is useful in evaluating whether Pacific's service meets § 451 requirements, namely Pacific's past performance. Where, as here, a degradation of service in violation of § 451 is alleged against a utility, the Commission has considered the past performance of that utility.[7]

We agree with ORA that Pacific's own past performance is an adequate yardstick to use to determine a violation of § 451.

[7] ORA cites Application of Southern California Edison Company (2001) D.01-03-029, 2001 Cal. PUC LEXIS 223; Corona City Council v. Southern California Gas Company (1992) 45 CPUC2d 301; D.92-08-038.

2. Pacific's ARMIS Data Demonstrate a Violation of § 451; the Commission is Not Limited to Use of Its GO 133-B Data

Pacific objects to the use of data Pacific submits to the FCC and claims that we should rely entirely on the service quality data that Pacific submits to the Commission pursuant to GO 133-B. We disagree. The GO 133-B data do not measure the service outage times for residential customers. It is appropriate that we go to outside sources, in this case to the Automated Reporting Management Information System (ARMIS) data that Pacific provides to the FCC, to measure repair times for residential customers.

Pacific asserts that there are many different sources of service quality data for Pacific, but the most relevant to this case are the GO 133-B data measured pursuant to the Commission's order. Pacific asserts that these data are relevant because the Commission has established the measures and reporting requirements to indicate the level of service for all telecommunications providers. Pacific's witness Resnick presented Pacific's GO 133-B results for the 12 months before the merger and for 2000 (Exh. 31, p. 4). That information shows that Pacific has improved in 2000 over the twelve months before the merger in all but one category, repair reports per 100 lines, where the results went from 1.3 per 100 lines in the 12 months prior to the merger to 1.7 per 100 lines in 2000. However, the result for this category still exceeds the Commission's standard, which is 6 trouble reports per 100 lines.

We do not dispute the importance of our GO 133-B reporting system. However, that reporting mechanism does not address the specific issue ORA has raised here, namely service outage times for residential customers. This is a key aspect of service quality, and we will allow ORA to present data based on the FCC's ARMIS system, since our own data collection system does

not cover that particular element of service quality. We affirm the January 12, 2001 Ruling of the assigned ALJ that we are not limited to use GO 133-B data to determine whether a carrier has violated § 451.

ORA based its complaint on the ARMIS reports that Pacific submits to the FCC.[8] Those reports include data regarding initial and repeat repair intervals.[9]

The ARMIS service quality data are self-reported by Pacific and other local exchange carriers and are not verified by the FCC. The FCC ARMIS reports show the following *initial* out-of-service repair intervals, in hours, for Pacific's California residential customers for the period 1996-2000[10]:

1996	1997	1998	1999	2000
29.3	46.8	50.0	37.9	42.5

[8] In addition to the ARMIS data, ORA presented reports of 1,687 complaints; ORA had received those reports from Pacific. Pacific's witness Gleason examined all 1,687 complaints and found that only 65% deal with loss of dial tone, which is the subject of ORA's case. Pacific concludes that because the customer complaints do not have statistical significance, they prove nothing.

ORA's witness Rochester indicates that ORA does not claim the reports it received from Pacific are statistically significant. Rochester states that the complaints are offered only as accounts of individual customers' experiences with Pacific's repair service. In making our determination that Pacific violated § 451, we do not rely on the data contained in the 1,687 complaints submitted by ORA.

[9] The FCC defines "repair interval" as the total time from receipt of the customer trouble to clearing the trouble. A "repeat interval" is defined as customer trouble reports concerning service quality that are received within 30 days after the resolution of an initial trouble report on the same line.

[10] ORA's Complaint itself included ARMIS data for 1996 – 1999. The source for the 2000 data is Exh. 33, Pacific's Response to ORA's Third Set of Data Requests.

The ARMIS reports show similar information for *repeat* out-of-service repair intervals for California's residential customers:

1996	1997	1998	1999	2000
39.4	46.8	50.2	39.9	44.6

In its Answer to ORA's complaint, Pacific admits that ORA has provided a true and correct copy of the ARMIS reports specified in ORA's complaint.[11] In its Answer, Pacific also admits that it reports ARMIS service quality data to the FCC and that the FCC has not in the past verified that data.[12] In its Opening Brief, Pacific asserts: "ORA has not established that the ARMIS data for out-of-service intervals are accurate and reliable and provide any basis for imposing penalties on Pacific."[13]

We find that the ARMIS data, which show a 45% increase in the mean time to restore service to residential customers over the period 1996-2000, demonstrate a violation of § 451.

VI. Pacific's Attempts to Refute or Excuse the ARMIS Data Do Not Have Merit

Pacific makes various efforts to rebut or explain the ARMIS data. Pacific claims that ORA has not shown that the data are "accurate and reliable" since the

[11] Pacific's Answer to Complaint at 5.

[12] *Ibid.*

[13] Pacific's Opening Brief at 34.

data are compiled by Pacific and the FCC has not in the past verified the data. We find Pacific's argument troubling, to say the least, in light of the fact that *Pacific* itself compiles this information, which it transmits to the FCC.

We find it disturbing that Pacific argues that it is ORA's responsibility to prove the accuracy of the data that Pacific provides to the FCC. We expect Pacific to make every effort to ensure that the data it provides to its federal oversight agency are accurate and complete, regardless of whether the FCC audits the data. Pacific's argument that we should not rely on the data it provides to the FCC is not convincing. We rely on the accuracy of the GO 133-B data that Pacific supplies the Commission, even though that information is self-reported by Pacific, and generally is not audited by this Commission, and we rely here on the data Pacific self-reports to the FCC.

Pacific's witness Gleason also testifies that the use of the mean or arithmetic average to describe restoration intervals and to draw inferences about the typical experiences of customers is inappropriate.[14] Gleason states that the data are more accurately reflected by the median, which identifies the point in the distribution that divides the observations into two equal halves. According to Pacific, the mean overestimates customer experience because it is too heavily affected by a small number of extreme events.

Gleason calculated the mean and median intervals for December 2000[15] and came up with a mean for the month of 36.6 hours, and a median of 25 hours, meaning that 50% of customers had their problem resolved in 25 hours—just over one day. However, Gleason did not provide annualized median data for

[14] Gleason for Pacific, Exh. 29, at 17.

the entire period in question, namely 1996 – 2000, so we have no way of knowing whether Pacific's median repair intervals have increased or not over the period in question. And it is the *increase* in repair intervals that disturbs us—an increase of 45% of the mean interval to repair between 1996 and 2000. Pacific does not refute the data ORA presents based on means, merely states that the median would be a better indicator of central tendency given the distribution of Pacific's repair intervals.

ORA's witness Rochester does include calculations of both the mean and median for the period January 1999 – June 2000.[16] What that graph illustrates is that Pacific's overall performance shows the same trend whether it is measured by the median or mean. The distribution of the median, while lower than the mean, mirrors the results found in using the mean. In other words, the median displays the same trend as the mean.

While the median may be a better indicator of central tendency for measuring repair intervals, the mean is also an acceptable measure. If a time series based on the median would have showed a less significant increase in the repair times, Pacific should have presented that information. However, based on the data ORA presented comparing the mean and median, we conclude that the ARMIS data ORA has presented using the mean provide an adequate measure of Pacific's residential repair service quality.[17]

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[15] *Id.* at 18, Figure 5.

[16] Rochester for ORA, Exh. 12C at 8.

[17] ORA attempts to compare Pacific's ARMIS data with that reported by other carriers to show that Pacific's repair intervals are generally longer than those of any other carrier. Pacific points out that its data are not comparable to the data for other companies because the processes used by the companies to issue trouble reports differ,

Footnote continued on next page

Pacific next points to various external events—weather, cable cuts, increased number of access lines—to attempt to explain why its repair interval has worsened, but Pacific's arguments are not credible. Pacific does not show a direct correlation between the outage data and the external events. We are not convinced by these arguments. Pacific has not alleged that there has been a change in the methodology used to develop the data over the 1996-2000 period. Also, Pacific presented no other data that we can use to measure the repair service for residential customers.

Pacific argues that there are factors that caused Pacific's out-of-service intervals to increase in certain years. Pacific indicates that customers may not be available for the earliest appointment. In cases where customers request appointments several days out, the clock continues until the work is completed. This increases the intervals, but Pacific indicates that it is not at fault for the increase. However, as ORA asserts in its Reply Brief, there is no evidence in the record that shows any correlation between the duration of Pacific's out-of-service intervals and customer unavailability for appointments. Nor has Pacific presented any evidence that customer unavailability for appointments has increased between 1996 and 2000, to tie that factor to the increase in time to restore service. Resnick indicates that Pacific offers same day appointments today more often than it has in the past.[18] However, he does not assert that the number of customers unavailable for same-day appointments has increased. Therefore, Pacific has presented no evidence that there is any correlation

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which affects the out-of-service intervals. We concur with Pacific that it is not possible to make meaningful comparisons between Pacific and other carriers using ARMIS data.

[18] Resnick for Pacific, Exh. 31, p. 6.

between the unavailability for same-day appointments and the increase in the mean time to repair.

Pacific states that weather has affected out-of-service intervals, citing floods in the Sacramento Delta Region in 1997 and El Nino effects in 1997 and 1998. However, as ORA states, in support of this statement, Pacific's witness Resnick, proffered rainfall data for San Francisco.[19] Pacific's chart fails to consider rainfall totals outside of San Francisco even though Pacific has customers statewide and the rainfall experience in other areas may be very different from that in San Francisco. In spite of this, Resnick concludes that "these heavy rains caused a 4% increase in the number of trouble tickets in 1997 compared with 1996, and a 12% increase in the number of trouble tickets in 1998 compared to 1996." Therefore, Pacific's attempt to make a direct correlation between weather effects, based only on San Francisco's experience, and specific increases in numbers of trouble tickets is not credible.

Pacific also points to the booming economy which caused Pacific to experience unprecedented growth in access lines since 1996. Pacific states that to respond to these demands, Pacific increased its technician work force by 31% from 1996 to 2000 and increased capital expenditures by 41% in the same period.[20] While we acknowledge that an increase in the number of access lines can lead to an increase in trouble tickets, Pacific has a duty to provide adequate service to all of its customers. Presumably a sufficient increase in technician workforce hired to deal with service outages should help to keep the mean time to repair from increasing. Pacific has presented no evidence as to the specific

[19] *Id.* p. 8.

correlation between the increase in access lines and the increase in out-of-service intervals.

Pacific also attributes an increased number of cable cuts to the increase in construction due to the boom in the economy. According to Pacific's witness Resnick, between 1996 and 2000, the number of underground cable damages rose 19%.[21] And in 2000, according to Resnick, the top 10 vendor-caused cable damages added nearly three hours to the overall residence out-of-service interval for the year. He acknowledges that there were more cable cuts in 1999 than in 2000, but indicated that those in 2000 were of greater severity resulting in more increased duration.[22] However, Resnick does not provide similar data for other years so we have no way of knowing the impact of cable cuts on the out-of-service intervals for 1996-1998.

In its Reply Brief, ORA acknowledges that Pacific enumerated a number of factors but states that Pacific did not prove that any of them *caused* Pacific's out-of-service intervals to increase in any of the years in question. We agree that Pacific has not demonstrated that the external factors have a specific correlation to Pacific's mean repair intervals for the period 1996 - 2000.

A. Pacific's Failure to Provide Customers With A Meaningful Opportunity to Request a 4-Hour Appointment Violates § 451

Section 451 requires the utility to provide adequate, efficient service to promote the "safety, health, comfort and convenience of its patrons … and the public." We conclude that Pacific's current Interactive Voice Response (IVR)

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[20] *Id.* at 7.

[21] *Id.* p. 7.

[22] *Id.* p. 10.

system, which receives calls to Pacific's 611 repair service violates these provisions of § 451. For many customers with work or school responsibilities, it is not convenient to stay home to wait all day for repair service. Pacific has a four-hour appointment option available and needs to inform its 611 callers that they can request a four-hour appointment.[23]

There is currently no specific requirement in the Public Utilities Code that utilities provide their customers an opportunity to request a four-hour appointment window when they call for repair service. However, Civil Code § 1722 does have such a requirement. Subsection (c)(1) reads as follows:

> Utilities shall inform their subscribers of their right to service connection or repair within a 4-hour period at the time the subscriber calls for service connection or repair, or by notifying the subscriber by mail three times a year of this service.

Pacific asserts that its customers do have an opportunity to request a four-hour appointment, while ORA disputes this conclusion. The dispute centers on how calls are handled by Pacific's IVR system. Pacific asserts that pursuant to Civil Code § 1722, customers are given an opportunity to request a four-hour appointment. Pacific notifies customers three times per year that they

[23] Pacific accuses ORA of manufacturing evidence relating to the test calls ORA staff members made to Pacific's 611 service to determine whether they were offered a four-hour appointment window. Pacific also accuses ORA of entering into inappropriate ex parte contacts. (Pacific's Opening Brief at 46-48.) We have reviewed the specific allegations regarding the declarations of ORA employees who made the test calls to the 611 repair service and find that Pacific's allegation is not supported by the facts. As to Pacific's allegation about inappropriate ex parte contacts, ORA makes it clear that the two communications Pacific cited were made prior to the filing of the complaint case, when ex parte rules were not yet in effect.

can request 4-hour appointments and also puts information in its Customer Guide pages.[24] Furthermore, Pacific's witness Resnick testified:

> [W]e have thousands of customers each day that we service, both installation and repair, that do request and are given a four-hour appointment window.[25]

Pacific states the Commission is considering adoption of Proposed Rule 4(c) in its Telecommunications Consumer Protection Rulemaking (R.00-02-004). That proposed rule would require all utilities to establish a four-hour window for installation or repair service. If the utility fails to repair the customer's service within that window, it would have to provide a $25 credit to the customer. ORA's witness Rochester testifies that she is aware of proposed Rule 4(c) and knows the rule is not yet in effect, but wants Pacific to offer the four-hour window prior to adoption of the rule.[26] Rochester acknowledges that other telephone companies are not required to offer the four-hour window now, and are not violating a law by not doing so. According to Pacific, Rochester thereby concedes that § 451 does not currently require telephone companies to offer a four-hour appointment.

In response to Pacific's argument, ORA states that it is not alleging that § 451 requires all utilities to proactively offer a four-hour window for repair appointments. "ORA is alleging that Pacific's failure to provide an opportunity for Pacific's customers to ask for a four-hour appointment window does not

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[24] Moore for Pacific, Exh. 39, Attachment 1.

[25] Resnick for Pacific, 2 RT 254.

[26] Rochester for ORA, 1 RT 122-123.

comport with Pacific's duty to provide adequate, efficient, just and reasonable service that promotes the convenience of the public."

According to ORA, the evidence shows that Pacific assures customers in its White Pages, in bill inserts and in newsletters that customers can ask for a four-hour window for repair appointments. But the evidence of Pacific's repair script shows that customers who use the IVR system are not given an opportunity to request a four-hour appointment window if they follow Pacific's instructions. ORA concludes that Pacific's residential repair service scheduling system does not provide customers with a reasonable opportunity to request a four-hour appointment period and thus fails to promote the convenience of its customers.

Pacific concedes that customers must talk to a live Maintenance Administrator (MA) in order to request a four-hour appointment. According to Pacific's witness Moore,

> The customer is given a company-offered appointment by either an MA or through the CCSN [Customer Care Service Node]. If the customer is not satisfied with the appointment given by the CCSN, she has an opportunity at the end of the CCSN dialog to speak with a MA, and at that time, the customer may request a four-hour window.[27]

We need to determine whether or not Pacific's customers have a reasonable opportunity to request a four-hour appointment window. We conclude that they do not. Pacific has so structured its IVR system as to discourage the exercise of that option even by a customer who may be aware of its existence. Customers who call Pacific's system are not told that they need to

talk to an MA in order to get a four-hour appointment window. The script does not mention the possibility of a four-hour window, thus, the caller who uses the IVR system and makes an appointment without talking to an MA is not made aware of the option. Only those callers who talk to an MA might be told of the option. We conclude that the four-hour window option is not a meaningful choice because callers to 611 are not made aware that the 4-hour window option is available to them.

B. Pacific's Long Repair Intervals Violate OP 2 of D.97-03-067 and § 702.

OP 2 of D.97-03-067 reads as follows:

> Notwithstanding the status of the merger of SBC and Telesis, Pacific shall file annual information consistent with existing reporting requirements to demonstrate the maintenance or improvement of service quality consistent with Commission rules and General Orders (GOs). Pacific shall maintain or improve its service quality over the five years following the merger. (71 CPUC2d 351, 411, OP 2, D.97-03-067.)

Based on the 1996-2000 ARMIS data ORA provided in this proceeding, we find that Pacific has violated our mandate that Pacific "maintain or improve" its service quality in the years following the merger. Pacific's repair service for residential customers has worsened significantly since 1996.

In each of the years following the merger, Pacific's residential repair service intervals have been longer than they were before the merger. In Part A of this decision, we find that Pacific's initial out-of service repair intervals for

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[27] Moore for Pacific, Exh. 39 at 6-7.

residential customers increased 45% between 1996 and 2000. Here we rely on the same ARMIS data for 1996-2000.

Pacific argues that the ARMIS data do not prove that Pacific provides poorer service since the merger because the merger was approved on March 31, 1997 so the five years following the merger begin in 1998, not in 1997. We disagree. The last complete year Pacific was independent of SBC was 1996. This then is the year the Commission should use as its standard of comparison to determine whether Pacific has "maintained or improved" its residential repair service quality since the merger. The merger occurred at the end of the first quarter of 1997 so it is appropriate to include 1997 as a "post merger" year. Pacific's suggestion that we use 1997 as the base year is transparently self-serving, since the mean time to restore residential service jumped from 29.3 in 1996 to 46.8 in 1997, an increase of 60%.

Pacific asserts that the Merger Decision does not indicate that Pacific must meet a certain target for out-of-service intervals, or that the Commission intended to look beyond its own service quality regulations to determine if Pacific met the requirements of OP 2. According to Pacific, to create a specific standard in this complaint case in 2001 and say that Pacific had to meet that standard beginning in 1997 creates an ex post facto law.

We disagree. OP 2 sets a clear standard for Pacific to follow, namely, it is to "maintain or improve" its level of service quality. "Maintain" means that service quality will not decline, but Pacific's residential repair service intervals have increased significantly since 1996, a clear decline in the quality of service. We gave Pacific clear notice of our service quality expectations in OP 2, and we also put Pacific on notice that we would be monitoring its service quality over the five years following the merger. This decision represents our conclusions

regarding the level of repair service provided to date to Pacific's residential customers since the merger.

We agree with Pacific that GO 133-B data would be one element we should examine regarding Pacific's service quality. However, Pacific asserts that even if the Commission includes the ARMIS data in its analysis, it should weigh all the ARMIS data with the GO 133-B data. According to Pacific, all those data taken together demonstrate that Pacific provides excellent service. We find that aggregating data in the manner Pacific proposes has the effect of masking poor service quality in one area, in this case, the repair experience for residential customers. We consider this particular area of service quality to be extremely significant, and one that merits our specific attention. We are not willing to find that Pacific's service quality is excellent when initial out-of-service repair intervals for residential customers have increased 45% since 1996. We conclude that this increase in repair intervals cited above is a violation of OP 2 of D.97-03-067.

Pub. Util. Code § 702 requires Pacific: "…to obey and comply with every order, decision, direction, or rule made or prescribed by the Commission." ORA contends that Pacific's repair service quality has worsened since its merger with SBC, in violation of OP 2 of D.97-03-067 and thus Pacific is in violation of § 702. While Pacific asserts that ORA has failed to prove that Pacific violated the Merger Decision, we find above that the increased repair service intervals do constitute a violation of OP 2. By violating OP 2 of D.97-03-067, Pacific has also violated § 702, in that it has not complied with our order in the Merger Decision.

C. Pacific's High Customer Dissatisfaction Levels Do Not Violate OP 2 of D.97-03-067

According to ORA, the ARMIS reports show that Pacific's residential customers have become increasingly dissatisfied with the quality of Pacific's

repair service since Pacific's merger with SBC.[28] ORA asserts that this is a violation of OP 2. In support, ORA presents the following ARMIS information:

[28] On the first day of hearing, following extensive voir dire of ORA's witness Rochester regarding her knowledge of survey methodology and statistical methods, Pacific moved to strike her testimony on the basis that she is not an expert witness. The presiding ALJ denied Pacific's motion to strike stating that Rochester's background at the Commission qualifies her as an expert witness. We affirm the ALJ's Ruling and reiterate that we are not required to follow the formal rules of evidence. Pacific's claims go to the weight of the evidence, not the admissibility of particular evidence.

Percentage of Pacific Bell Residential Customers Dissatisfied with Repair Service[29]

1996	1997	1998	1999
8	11.2	16.28	16.4

Thus, says ORA, since the merger with SBC, the percentage of customers dissatisfied with Pacific's service has more than doubled. Pacific argues that the increase in 1998 results was caused by a change in the survey, not from an actual increase in dissatisfaction. In 1998 Pacific instituted a new response scale, and Pacific's witness Gleason suggests that the change was based on the respondents' reaction to the words used in the new response scale, and did not indicate any particular change in service levels. Following are the old and new response scales:

[29] Rochester for ORA, Exh. 2 at 31.

Table 1

Original and Revised Survey Questions

(1) Questions		
	ORIGINAL SURVEY 1997 Considering only the problem that was reported on (date), would you say that Pacific Bell's service was	REVISED SURVEY 1998 Thinking about the repair service from Pacific Bell, overall were you:
(2) Response Categories		
1	Excellent	Very Satisfied
2	Good	Satisfied
3	Just OK	Neutral
4	Poor	Dissatisfied
5	Terrible	Very Dissatisfied

Gleason concludes that the sum of the percentages in the bottom three boxes has remained essentially constant. Dissatisfaction in all of its forms, mild to severe, has not appreciably changed during the study period.

ORA states that Pacific does not explain why the Commission should assume that Pacific's customers do not know the difference between the meaning of "Just OK" and "Dissatisfied." Pacific ignores the more logical possibility that customer responses have shifted because customers are more dissatisfied with Pacific's service. We agree with ORA that it is reasonable to presume that customers who participated in the survey know the difference between "just OK" and "dissatisfied."

We find, based on the ARMIS data, that customer dissatisfaction with Pacific's repair service has increased since the Merger Decision, but this increase does not constitute a violation of OP 2. OP 2 requires Pacific to "maintain or improve" its service quality, but it does not state that Pacific has to maintain or improve its customers' perception of its service quality. The two are not synonymous. Although increased customer dissatisfaction may reflect deteriorating service quality, customer dissatisfaction, in and of itself is insufficient to establish that Pacific violated OP 2.

VII. Remedies Adopted

A. Penalty Mechanism for Failure to Meet Residential Repair Service Standards

In the discussion above, we find that the increase in Pacific's mean time to restore dial tone for its residential customers since 1996 violate both §§ 451 and 702 and OP 2 of the Merger Decision. ORA urges the Commission to provide customers with guarantees of quality repair service within a specified time and to establish a penalty mechanism if Pacific fails to meet repair service guarantees. However, ORA does not make any specific recommendations as to the standard to use or the appropriate penalty mechanism we should adopt. Therefore, we have developed the following remediation plan based on the principles adopted in D.98-12-075.[30] ORA does not propose that Pacific be subject to penalties for past lack of compliance, and we do not order penalties based on the past violations ORA identified.

In order to establish a reasonable standard for repair service, we look to the data for 1996, the last complete year before Pacific's merger with SBC. In the Merger Decision we ordered Pacific to maintain service quality in the five years following the merger, so it is appropriate to use 1996 data as the standard to follow. In other words, the standards we set for Pacific are based on its 1996 performance--a mean time of 29.3 hours to repair initial out-of-service requests and a mean of 39.4 hours for the repeat out of service interval. The comparable figures for 2000 were 42.5 hours (initial) and 44.6 hours (repeat). We will order

[30] D.98-12-075 set standards of conduct governing relationships between energy utilities and their affiliates. However, the rules adopted in that decision are general in nature, and we have used them as a guideline in other cases for setting the appropriate

Footnote continued on next page

Pacific to file a plan showing the steps it intends to take to meet the standards of 29.3 hours (initial) and 39.4 hours (repeat).

Violations of Commission decisions are subject to monetary penalties under § 2107 and § 2108, which state as follows:

> **§ 2107**: Any public utility which violates or fails to comply with any provision of the Constitution of this state or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500), nor more than twenty thousand dollars ($20,000) for each offense.
>
> **2108:** Every violation of the provisions of this part or of any part of any order, decision, decree, rule, direction, demand, or requirement of the commission, by any corporation or person is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense.

To determine the size of the penalty which Pacific will have to pay when it is out of compliance with either of the standards we set, we consider the criteria adopted by the Commission in D.98-12-075:

Criterion 1: Severity of the Offense

In D.98-12-075, the Commission held that the size of a penalty should be proportionate to the severity of the offense. To determine the severity of the offense, the Commission considers the following factors:[31]

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level of penalties. We used those guidelines to develop remedy plans in D.01-09-017, D.01-08-035, D.01-08-019, D.01-06-080, and D.01-04-035, to list just a few recent cases.

[31] 1998 Cal. PUC LEXIS 1016, *71 - *73.

> **Physical harm**: The most severe violations are those that cause physical harm to people or property, with violations that threatened such harm closely following.
>
> **Economic harm**: The severity of a violation increases with (i) the level of costs imposed upon the victims of the violation, and (ii) the unlawful benefits gained by the public utility. Generally, the greater of these two amounts will be used in setting the fine. The fact that economic harm may be hard to quantify does not diminish the severity of the offense or the need for sanctions.
>
> **Harm to the Regulatory Process**: A high level of severity will be accorded to violations of statutory or Commission directives, including violations of reporting or compliance requirements.
>
> **The number and scope of the violations**: A single violation is less severe than multiple offenses. A widespread violation that affects a large number of consumers is a more severe offense than one that is limited in scope. For a "continuing violation," § 2108 counts each day as a separate offense.

We do not find the violations resulted in economic harm. However, we do find that Pacific's violations of § 451 and OP 2 of D.97-03-067 could result in physical harm to Pacific's ratepayers. If customers have no dial tone, they do not have access to 911 service or to other emergency contacts. We find that, on average, Pacific's customers who reported a service outage were without dial tone over 13 hours longer in 2000 than they were in 1996. The longer the residential customer is without telephone service, the greater the potential of physical harm because of the customer's inability to contact emergency services.

If Pacific meets the standard we have set, risk of physical harm to Pacific's ratepayers will be reduced.

A third factor to examine involves harm to the regulatory process. In D.98-12-075, we indicate that a high level of severity will be accorded to any violation of statutes or Commission decisions. In this case, we found violations of both statutes (§§ 451 and 702) and a Commission order, D.97-03-067. We set a standard which, if met, would mean that Pacific was in compliance with that decision. While Pacific disagrees with our finding that it has violated OP 2 in the past, in this decision we make it clear that Pacific's failure to meet the standards specified in this decision will constitute a violation of a Commission order.

The final factor is the number and scope of the violation. We find that Pacific has violated OP 2 in every year since 1996. In other words, Pacific has exceeded its pre-merger average repair interval in every year since 1996. This was not an isolated event but a pattern of behavior which extends over the period 1997-2000. For a "continuing violation," § 2108 counts each day of a continuing violation as a separate offense. Therefore, on a prospective basis, each day of each month in which Pacific incurs penalties because it has failed to meet either of the standards we have set will be treated as a separate offense subject to a fine of at least $500 but not more than $20,000, as described in §§ 2107 and 2108.

We conclude that the severity of the offense is significant. While we find no economic harm, we do find a potential for physical harm. In addition, we find significant harm to the regulatory process as a result of Pacific's violation of both statutes and a Commission order. Further, we find multiple violations. This was not a single isolated event. Therefore, we conclude that the severity of this offense warrants a large penalty.

Criterion 2: Conduct of the Utility

In D.98-12-075, the Commission held that the size of a fine should reflect the conduct of the utility. When assessing the conduct of the utility, the Commission stated that it would consider the following factors:[32]

> **The Utility's Actions to Detect a Violation**: Utilities are expected to diligently monitor their activities. Deliberate, as opposed to inadvertent wrongdoing, will be considered an aggravating factor. The level and extent of management's involvement in, or tolerance of, the offense will be considered in determining the amount of any penalty.
>
> **The Utility's Actions to Disclose and Rectify a Violation**: Utilities are expected to promptly bring a violation to the Commission's attention. What constitutes "prompt" will depend on circumstances. Steps taken by a utility to promptly and cooperatively report and correct violations may be considered in assessing any penalty.

A smaller fine may be warranted if a utility promptly brings a violation to the Commission's attention.

To analyze this criterion, we need to view Pacific's past performance. We are not persuaded by Pacific's arguments that it has not violated § 451 or a Commission order. Pacific itself compiles the ARMIS data which it transmits to the FCC. Pacific could see the increase in the mean time to restore service. It is Pacific's duty to inform the Commission when it finds that its repair intervals were in contravention of a Commission decision and to take steps to rectify the

[32] 1998 Cal. PUC LEXIS 1016, *73 - *75.

situation. Pacific has had ample opportunity to do so since the numbers for every year since 1996 have exceeded the average recorded in 1996.

For the preceding reasons, we conclude that Pacific should have detected the violation and notified the Commission of its violation. Pacific did neither, which suggests that a large fine may be appropriate.

Criterion 3: Financial Resources of the Utility

In D.98-12-075, the Commission held that the size of a fine should reflect the financial resources of the utility. When assessing the financial resources of the utility, the Commission stated that it would consider the following factors:[33]

> **Need for Deterrence**: Fines should be set at a level that deters future violations. Effective deterrence requires that the Commission recognize the financial resources of the utility in setting a fine.
>
> **Constitutional limitations on excessive fines**: The Commission will adjust the size of fines to achieve the objective of deterrence, without becoming excessive, based on each utility's financial resources.

Pacific is the largest Local Exchange Carrier (LEC) in California with annual revenues in excess of $10 billion.[34] That figure suggests that a relatively small fine would not effectively deter Pacific from future violations of the repair standards established in this decision.

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[33] 1998 Cal. PUC LEXIS 1016, *75 - *76.

[34] We take official notice of FCC Report 43-02, the ARMIS USOA Report Pacific files annually with the FCC. The report for year-end 2000 shows total operating revenues of $10.8 billion.

Criterion 4: Totality of the Circumstances

In D.98-12-075, the Commission held that a fine should be tailored to the unique facts of each case. When assessing the unique facts of each case, the Commission stated that it would consider the following factors:[35]

> **The degree of wrongdoing**: The Commission will review facts that tend to mitigate the degree of wrongdoing as well as facts that exacerbate the wrongdoing.
>
> **The public interest**: In all cases, the harm will be evaluated from the perspective of the public interest.

Pacific described a number of factors that could have an impact on the ARMIS data, but we find no correlation between the weather effects, cable cuts, and other factors Pacific mentioned, and the mean time to repair and, therefore, we are not convinced by Pacific's arguments. Also, we conclude that the public interest is not served when Pacific experiences substantial increases in the average time it takes to restore service to residential customers.

Criterion 5: The Role of Precedent

In D.98-12-075, the Commission held that any decision that imposes a fine should (1) address previous decisions that involve reasonably comparable factual circumstances, and (2) explain any substantial differences in outcome.[36]

There are no previous Commission decisions that involve reasonably comparable factual circumstances. While the Commission has assessed penalties for violations of § 451, those decisions did not deal with service quality issues. However, there is a body of Commission precedent that bears on an issue

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[35] 1998 Cal. PUC LEXIS 1016, *76.

[36] 1998 Cal. PUC LEXIS 1016, *77.

relevant to this proceeding, namely, whether the Commission is required by § 2108 to impose a fine for each day of a "continuing violation."

In general, Commission precedent indicates that where there is a continuing violation, the Commission has discretion in deciding whether to assess a fine for each day of the violation. For example, in D.99-08-007 the Commission held that while it could find a continuing violation and assess additional fines pursuant to § 2108, the Commission is not required to do so. In other cases, namely D.01-04-036, D.00-07-051 and D.99-12-055 the Commission did find a continuing violation and assessed additional penalties pursuant to § 2108.

In prior cases, the Commission has evaluated a number of factors in making its determination of whether to impose additional fines under § 2108. We find it appropriate to assess penalties on a daily basis in this case, based on the need for effective deterrence of future violations and the importance we attach to violations of our orders.

Conclusion: Setting the Fine

We previously concluded that Pacific should be fined for any future failures to meet the standards we set for restoring service to residential customers. The application of the criteria established by D.98-12-075 to the facts of this case indicates that a relatively sizeable penalty is warranted. In particular, Pacific is the largest LEC in California, and any penalty must be high enough to deter Pacific from violating the Commission's order. While the record of this proceeding does not provide data on economic harm that has resulted to customers who were without dial tone, there is a potential for substantial physical harm to customers who are without dial tone for an extended period of

time. Also, there is significant harm to the regulatory process since we have found that Pacific violated statutes and a Commission decision.

According to Pacific's witness Resnick, the total customer trouble reports reported to ARMIS in 2000 was 3,337,684.[37] While the record of the proceeding does not show the number by month, we will divide that yearly total by 12 to determine an average number of trouble reports per month. That total is 278,140. We do not know how many of those trouble reports would be handled within the standard of 29.3 hours. For example, if half the customers did not have their service restored within 29.3 hours for initial outages, that would mean that over 139,000 customers would not have had service restored within the standard we have set. These figures are hypothetical, but they do give us some idea of the magnitude of the number of customers who could experience repair intervals longer than the standard we adopt in this decision.

We conclude based on the facts of this case that Pacific should be fined $10,000 for each day of a month in which it is subject to the penalties adopted in this order, for a total of $300,000 per month. The penalty mechanism we establish today is meant to give Pacific an incentive to meet the standards we have adopted and to deter future violations of our orders.

We further order that, beginning 60 days after approval of this order and until further order of the Commission, Pacific shall make monthly reports to the Directors of the Telecommunications Division and ORA that include the ARMIS data on initial and repeat out-of-service repair intervals. Those reports shall be due by the 20th of the following month and shall be on the same basis as

[37] Resnick for Pacific, Exh. 31 at 9.

the ARMIS data Pacific filed with the FCC for 1996-2000. If the FCC changes its methodology for calculating out-of-service repair intervals, Pacific shall institute a separate reporting system for providing data for this Commission, which retains the current methodology. Under no circumstances is Pacific to change its methodology for compiling the ARMIS information Pacific submits to ORA and the Telecommunications Division on residential repair service without seeking the approval of this Commission. We are not attempting to assert control over the FCC's rules for collecting ARMIS data. However, we must have consistent year-to-year data to evaluate Pacific's compliance with our order.

Beginning on January 20, 2003, and every year thereafter until further order of the Commission, Pacific shall file an Advice Letter in which it provides both monthly and annual information for the prior year. In any year in which Pacific fails to meet either of the two annual standards adopted, Pacific shall be subject to penalties for any month in which it fails to meet that particular standard. Pursuant to § 2107, we have the authority to assess penalties ranging from $500 to $20,000 for each offense. Considering the fact that we found that Pacific has violated a Commission order, and also considering the importance we place on residential repair service, we will require Pacific to pay $10,000 for each offense. For purposes of calculating an offense, under § 2108, each day of a month in which Pacific does not meet one of the standards will be considered a separate offense so the total monthly assessment for each standard will be $300,000. If Pacific fails to meet both standards, the monthly penalty will be $600,000. Concurrently with its Advice Letter filing on January 20 of each year beginning with January 20, 2003, Pacific shall transmit a check payable to the California Public Utilities Commission, for deposit to the General Fund, in an

amount which covers all months in the year in which Pacific has exceeded either one of the standards we have set.

We recognize that a catastrophic event[38] such as an earthquake, or a widespread service outage,[39] that is beyond Pacific's control, could have an impact on its ability to meet the standards we have set in the month in which the event occurs. In that case, that month should not be included in calculating the mean for the year, and Pacific should not be fined for failing to meet the standard. For example, if Pacific provides convincing data that a catastrophic event or widespread service outage caused an increase in the mean time to repair for a particular month, that month will be excluded when calculating the annual average for the year, and Pacific will not be subject to penalties for that month. We will require the TD to analyze Pacific's filing and recommend whether or not we should accept Pacific's data relating to a catastrophic event or widespread service outage.

For any month in which such a catastrophic event or widespread service outage occurs, Pacific should include the unadjusted ARMIS average for the month, along with an adjusted figure and workpapers that show (a) the date(s) of the catastrophic event(s) and, (b) how the adjusted figure was calculated.

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[38] A catastrophic event is defined as any event in Pacific's service area for which there is a declaration of a state of emergency, duly issued under federal or state law.

[39] For purposes of this order, a widespread service outage is defined as any outage affecting at least 3% of Pacific's residential customers in the state.

B. Four-Hour Window

Above we conclude that Pacific's customers who call 611 Repair Service do not have a meaningful option to request a four-hour appointment window, since a customer cannot accomplish that without speaking to a live MA. ORA asks that we set a four-hour appointment requirement and order Pacific to provide customers with a credit if Pacific fails to meet repair service guarantees.

As Pacific pointed out, the four-hour window requirement and $25 penalty for failing to meet the service timeline is the subject of a Rulemaking we initiated earlier this year. We prefer to address the four-hour window and $25 credit for failure to meet appointments within the scope of the rulemaking, where it would be applied to all carriers. Therefore, we will not adopt that remedy here.

However, we require Pacific to modify its IVR system to expressly alert the caller before an appointment is made, that a four-hour appointment is available. Pacific then has the option to either modify the IVR system to set four-hour appointments, or have all requests for four-hour appointments handled by the MAs.

VIII. Appeal of Presiding Officer's Decision

On October 9, 2001, pursuant to Rule 8.2 of the Commission's Rules of Practice and Procedure, Pacific filed an appeal of the Presiding Officer's Decision (POD) alleging numerous factual and legal errors. ORA filed a response to Pacific's Appeal opposing Pacific's allegations, but proposed some clarifying language in some instances.

Pacific raises the following eight major points in its Appeal:

1) It is unfair to impose new service standards on Pacific, without applying them to other telecommunications carriers; 2) The remedy plan

adopted by the POD violates Pacific's due process rights; 3) The remedy plan erroneously applies an annual standard on a monthly basis; 4) The POD commits legal error in relying on D.98-12-075 as the basis for the remedy plan; 5) The remedy plan fails to give adequate notice of adjustments allowed for extraordinary or catastrophic events beyond Pacific's control; 6) The remedy plan should include adjustments for customers who do not accept the first offered appointment; 7) the POD errs in forbidding Pacific from changing its ARMIS reporting practices without Commission approval; and 8) The POD wrongly finds that Pacific's out-of-service intervals violate the merger decision and §§ 451 and 702.

The eight issues Pacific raises are all discussed below. In each instance, we indicate if we have made changes elsewhere in the decision.

Pacific claims that it is unfair to impose new service standards upon Pacific without applying the same standards to the entire telecommunications industry. Pacific also states that there is no basis for making Pacific meet standards for out-of-service intervals, while other carriers are exempt from the requirement. ORA responds that Pacific alone is responsible for ensuring that its level of service quality complies with Section 451, the Merger Order, and all other laws and Commission rules. As ORA states, this complaint is about *Pacific's* repair service to *Pacific's* residential customers. The purpose of a complaint case is to bring before the Commission problems relating to a particular carrier, which ORA did in initiating this complaint case regarding service quality. The standards we adopt here apply to Pacific, and not to other local carriers, because we were persuaded by the evidence ORA presented that Pacific's service quality has deteriorated significantly over the 1997-2000 period, in violation of statutes and

the Merger Order. It is appropriate for us to craft a remediation plan specific to the deficiencies we found in Pacific's out-of-service intervals for residential customers.

Pacific asserts that the remedy plan adopted by the POD violates Pacific's due process rights because ORA made no specific remedy proposal in the course of the proceeding, and Pacific was not aware of the terms of the remedy plan until it reviewed the POD. We reject this assertion. Pacific had an opportunity to comment on the proposed remedy plan in its Appeal; indeed, as indicated below, we are adopting some of Pacific's proposals.

Pacific also asserts that the remedy plan erroneously applies an annual standard on a monthly basis. Because the annual mean is an average of all the monthly data throughout the year, Pacific could miss the annual standard potentially half of the months. We agree and have made the appropriate change that Pacific proposed. Namely, we will examine the annual data to determine whether Pacific has met our benchmark. If Pacific fails to meet the standards for that calendar year, Pacific will be subject to penalties for each month of that calendar year in which Pacific exceeds the standard.

Pacific also asserts that the POD commits legal error in relying on D.98-12-075 as the basis for the remedy plan because Pacific had no notice that the criteria from D.98-12-075 would apply, there is no record regarding the application of that decision to the facts of this case, and D.98-12-075 is distinguishable from this case on the facts. We disagree. We have crafted a remedy here based on the facts of this litigation. As ORA points out, whether or not a party cites a particular case is not dispositive of whether that case applies. The POD itself points out that the facts of this litigation are distinguishable from those in D.98-12-075, and the POD relies only on the principles adopted in

D.98-12-075, specifically, the factors the Commission considers in determining appropriate monetary penalties in each case.

Pacific indicates that its Westlaw search revealed only one case in which a Commission decision cited D.98-12-075. Our own review (using Lexis) produced a number of cases, all with differing factual evidence, in which we used the criteria adopted in D.98-12-075 to fashion a remedy. Footnote 30 in Section VII-A lists a few recent cases in which we employ the guidelines adopted in D.98-12-075.

We reject Pacific's assertion that Criterion 1 (severity of the violation) from D.98-12-075 does not apply since the POD found no economic harm, and only a potential for physical harm. Pacific claims that the potential for physical harm is reduced because of the number of customers who have second lines or cellular phones, and would be able to use those alternative means to reach emergency services. As ORA states, Pacific's assertion is speculative and not supported by any evidence in the record. Moreover, Pacific does not claim to provide faster, better repair service to customers who do not have second lines or cellular phones. The fact that some customers may be less inconvenienced than others by Pacific's slow repair service neither excuses nor mitigates the failure to perform repairs promptly.

The POD addresses two other aspects of the severity of the violations in the discussion of Criterion 1: harm to the regulatory process and the number and scope of violations. We have expanded the analysis in the POD to make that clear.

Pacific disputes the conclusion in Criterion 2, arguing that the merger decision did not contain an explicit requirement to meet a specific benchmark for out-of service conditions. We disagree. The merger decision required Pacific to

"maintain or improve" its service quality, which provides a clear and specific benchmark for Pacific to follow, using 1996 as the benchmark year since 1996 was the last full year prior to the merger.

Pacific cites data for 2001 to indicate that it has taken affirmative steps to improve its repair service. ORA responds that if Pacific has taken the data from the charts Pacific introduced as Exhibit 27, they have no probative value since no witness authenticated the charts or explained what the various terms mean. We rely here on the data for 1997-2000 which were litigated extensively in this proceeding. If Pacific has improved its residential repair service intervals, and continues to do so, Pacific should be able to meet the standards we have set, and in that case will avoid penalties under the penalty mechanism we are adopting.

In its Appeal, Pacific argues the POD's statement under Criterion 3 that Pacific has "annual revenues in excess of $10 billion" is not contained anywhere in the record of the proceeding, and therefore there is no basis for the POD's conclusion regarding Criterion 3. Pacific's revenues are a matter of public record, and in footnote 34 in Section VII "Criterion 3: Financial Resources of the Utility," we have taken official notice of the source of our information.

Criterion 4 deals with the totality of the circumstances, including facts that mitigate the degree of wrongdoing. Pacific claims that since there is no evidence to rebut Pacific's showing, it is legal error to find against Pacific on this issue. The POD provided ample reasons why Pacific's evidence was unconvincing, and we have added some clarifying language in the section under Criterion 4.

Pacific asserts that there is no legal authority for the POD's finding that fines are warranted under Criterion 5 as there is no Commission precedent to serve as justification of a penalty given the facts of this proceeding. ORA responds that the absence of case law involving penalties with similar facts does

not mean that Criterion 5 weighs against penalties in this case. We agree with ORA. Pacific mistakes the meaning of Criteria 5. If a penalty has been imposed in a case with similar facts, the Commission should justify any difference in treatment. However, since there were no prior penalty cases with similar factual issues, there is no factually similar precedent for the Commission to follow. That should not be construed to mean that no penalty is warranted. Pacific's logic would tie our hands and allow us to assess penalties only if a similar factual issue had been addressed previously. Using that logic, the Commission would be unable to respond appropriately to unreasonable practices that have not been tried (or discovered) before.

Pacific argues that the remediation plan in the POD fails to give adequate notice of allowable adjustments for events beyond Pacific's control and claims that there are internal inconsistencies in the POD in describing the nature of the permitted adjustments. Pacific notes that the term "catastrophic" is not defined. Pacific then lists events for which Pacific says adjustments should be allowed, including weather effects, customers who do not accept the first offered appointment or miss an appointment, uncontrolled dogs, and cable cuts. We have included definitions for a catastrophic event and widespread service outage in a footnote in Section VII (Conclusion: Setting the Fine.) However, the events Pacific would like us to include are typical occurrences in any year and do not warrant special treatment. The data calculated for 1996, and for all subsequent years, include weather effects, cable cuts, and customer-missed appointments, and there is no justification for affording special treatment for those items on a going forward basis.

According to Pacific, the remedy plan should include adjustments for customers who do not accept the first offered appointment. ORA responds that

Pacific has not shown that there is any correlation between its lengthening out-of-service repair intervals and customer unavailability. And as the POD points out, Pacific has presented no evidence that customer unavailability for appointments has increased between 1996 and 2000. Therefore, we see no reason to make an exception for customers who do not accept the first offered appointment.

Pacific asserts that the POD errs in forbidding Pacific to change its ARMIS reporting practices without Commission approval, since the issue was not addressed in the record of the proceeding. Further Pacific asserts that the Commission is precluded from asserting control over the FCC's rules for collecting ARMIS data. We agree that this Commission does not have the authority to mandate the parameters of the FCC's ARMIS system. However, for our purposes, we need to have comparable data over time to determine whether Pacific is in compliance with our order. Therefore, we clarify that Pacific shall not change the methodology for compiling the ARMIS data reported to ORA and the Telecommunications Division without prior permission from the Commission. At present, we receive the same information Pacific provides to the FCC and can use that information to analyze Pacific's performance. However, we do have the authority to mandate a reporting system for this Commission and have clarified our intent and the limits to our authority.

Pacific claims that the POD erroneously concludes that Pacific's out-of-service intervals violate the merger decision and Sections 451 and 702 of the Public Utilities Code. Pacific states (correctly) that the POD rejects some of the evidence presented by ORA. However, as ORA points out, Pacific neglects to mention that the evidence the POD did rely on to make its determination that Pacific had violated Sections 451 and 702 was the ARMIS data Pacific itself

prepared and submitted to the FCC. We uphold the POD's finding that the ARMIS data demonstrate that Pacific violated Section 451 and the Merger Decision.

Pacific also asserts that the Merger Decision gave Pacific no notice that the Commission would use service quality results filed pursuant to FCC rules to judge Pacific's compliance. According to Pacific, the only notice given in OP 2 is that the Commission would evaluate GO 133-B results. We reject Pacific's argument. As stated in the POD, we rely on the Merger Decision's requirement in OP 2 that Pacific "maintain or improve" its service quality in the five years following the merger. As the POD found, Pacific has failed to maintain the level of repair service for residential customers, and that failure constitutes a violation of the Merger Decision.

Findings of Fact

1. The Commission's GO 133-B data do not measure service outage times for residential customers.

2. Pacific reports ARMIS service quality data to the FCC, and the FCC has not in the past verified that data.

3. The ARMIS data show that Pacific's mean (or average) for initial out-of-service repair intervals increased 45% between 1996 and 2000.

4. The mean is an acceptable measure of central tendency.

5. The ARMIS data ORA presented are an adequate measure of Pacific's residential repair service quality.

6. There is no evidence in the record that shows any correlation between the duration of Pacific's out-of-service intervals and customer unavailability for appointments.

7. Pacific has not presented any evidence that customer unavailability for appointments has increased between 1996 and 2000.

8. Pacific has failed to establish a direct correlation between weather effects, and specific increases in numbers of trouble tickets within its service area.

9. Pacific has presented no evidence showing a specific correlation between the increase in access lines and the increase in out-of-service intervals.

10. While Pacific presented evidence on the effect of cable cuts on the mean time to repair for 1999 and 2000, it presented no data on the specific impact cable cuts had on repair times for 1996-1998.

11. Pacific failed to demonstrate that external factors had a specific correlation to Pacific's mean repair intervals for the years 1996 – 2000.

12. The ARMIS data demonstrate a 45% increase in the mean initial out-of-service repair interval for residential customers over the 1996-2000 period; the ARMIS data provide an adequate standard for the Commission to use in evaluating Pacific's performance for this element of service quality.

13. Pacific's customers must talk to a live MA in order to request a four-hour appointment.

14. Pacific's customers who call the 611 repair service do not have a meaningful opportunity to request a four-hour appointment.

15. Pacific was given clear notice of the Commission's service quality expectations in OP 2 of D.97-03-067; Pacific was directed to "maintain or improve" its level of service quality in the five years after the merger with SBC.

16. Aggregating the ARMIS and GO 133-B data would mask poor service quality in one area.

17. Out-of-service repair intervals for residential customers are a particularly significant element of service quality.

18. The Commission cannot find that Pacific's service quality is excellent when the initial out-of-service repair intervals for residential customers has increased 45% since 1996.

19. Based on the ARMIS data, customer satisfaction with Pacific's repair service has decreased since D.97-03-067.

20. A standard initial out-of-service repair interval of 29.3 hours for residential customers is acceptable, since this is the service level Pacific attained in 1996, prior to its merger with SBC.

21. A standard repeat out-of-service repair interval of 39.4 hours for residential customers is acceptable, since this is the service level Pacific attained in 1996, prior to its merger with SBC.

22. A catastrophic event is any event in Pacific's service area for which there is a declaration of a state of emergency duly issued under federal or state law.

23. A widespread service outage is an outage affecting at least 3% of Pacific's residential customers in the state.

Conclusions of Law

1. Under Pub. Util. Code § 1702, a complainant must prove an alleged violation of a specific standard contained in a statute, rule or order of the Commission. The standard of proof is by a preponderance of the evidence.

2. ORA has standing to bring this complaint, under Pub. Util. Code §§ 309.5 and 1702, and the January 12, 2001 ALJ Ruling so holding should be affirmed.

3. The Commission is not limited to the use of GO 133-B data to determine whether a carrier has violated § 451.

4. A decrease in the level of service quality may constitute a violation of § 451.

5. The ARMIS data, which show an increase in the initial and repeat out-of-service repair intervals between 1996 and 2000, demonstrate a violation of § 451.

6. Pacific's own past performance is an adequate yardstick to use to determine a violation of § 451.

7. Pacific's current IVR system does not promote the convenience of the public, which constitutes a violation of § 451.

8. Because Pacific was given clear notice in OP 2 of D.97-03-067 that, as a condition of the merger with SBC, it was to maintain or improve its service quality, the Commission's finding that Pacific's record in recent years violates that condition does not constitute an ex post facto law.

9. The ARMIS data, which show an increase in the initial and repeat out-of-service repair intervals between 1996 and 2000, demonstrate a violation of OP 2 of D.97-03-067.

10. Increases in customer dissatisfaction alone are insufficient to establish a violation of the OP 2 requirement that Pacific "maintain or improve" its service quality.

11. A violation of OP 2 of D.97-03-067 constitutes a violation of § 702.

12. Pursuant to § 2107, Pacific may be fined for violating §§ 451 and 702 and D.97-03-067.

13. Pursuant to § 2108, each day of a continuing violation is treated as a separate and distinct offense for purposes of calculating penalties.

14. It is reasonable to set service quality performance standards that Pacific must meet or be subject to penalties. The amount of the penalty should be based on the criteria established in D.98-12-075.

15. Pacific's violations of § 451 and OP 2 of D.97-03-067 could result in physical harm to Pacific's ratepayers.

16. A high level of severity should be accorded to any violation of a statute or Commission decision.

17. Pacific, the largest LEC in California, would not be effectively deterred by a small penalty.

18. The public interest is not served when the average time it takes to restore service to Pacific's residential customers increases substantially.

19. The Commission's Telecommunications Division will review Pacific's annual Advice Letter and will recommend to the Commission whether it should accept or reject Pacific's data relating to catastrophic events or widespread service outages.

20. If a catastrophic event or widespread service outage, as defined in today's decision, occurs in one or more months of the year, Pacific should exclude those months from its calculation of the annual average for the year.

21. If a catastrophic event or widespread service outage, as defined in today's decision, occurs in one or more months of the year, Pacific should be excused from any penalty for the month in which the event occurs or the month in which the service problems from the catastrophic event continue.

O R D E R

IT IS ORDERED that:

1. The Office of Ratepayer Advocates' (ORA) complaint against Pacific Bell Telephone Company (Pacific) is granted to the extent set forth in the Conclusions of Law above.

2. The January 12, 2001 Administrative Law Judge's (ALJ) ruling denying Pacific's motion to dismiss the complaint on the grounds that ORA lacks

standing to file a complaint and failed to allege facts sufficient to support its claims is hereby affirmed.

3. Beginning 60 days from the effective date of this order, Pacific shall make monthly reports to the Directors of the Telecommunications Division and ORA which include the Automated Reporting Management Information System (ARMIS) data on initial and repeat out-of-service repair intervals for the previous month. Such monthly reports shall be due by the 20th of the following month. Such filings shall be accompanied by an affidavit, signed by an officer of the company, under penalty of perjury, asserting that the data are correct and that the methodology used for compiling the ARMIS information has not been changed, except as provided in Ordering Paragraph 4.

4. If the Federal Communications Commission changes its methodology for compiling the ARMIS data, Pacific shall establish a separate reporting system for ORA and the Telecommunications Division, that maintains the current methodology.

5. Pacific shall not change its methodology for compiling the ARMIS information Pacific submits to ORA and the Telecommunications Division on residential repair intervals without prior approval of the Commission.

6. Beginning January 20, 2003, Pacific shall file an annual Advice Letter in which it provides monthly and annual ARMIS data on initial and repeat out-of-service repair intervals for residential customers for the prior year. Such filing shall be accompanied by an affidavit, signed by an officer of the company, under penalty of perjury, asserting that the data are correct and that the methodology used for compiling the ARMIS information has not been changed. Pacific shall be subject to penalties if it fails to meet the annual standards of 29.3 average hours (for initial out-of-service repair intervals) and 39.4 average hours (for

repeat out-of-service intervals). If Pacific fails to meet either of the annual standards, it shall be subject to penalties for any months in that year in which it exceeds that particular standard.

7. In any calendar year in which Pacific fails to meet the annual mean of 29.3 hours initial out-of-service repair interval, Pacific shall be subject to a penalty of $300,000 for each month of the year in which the mean initial out-of-service interval exceeds 29.3 hours. Such fine shall be payable to the California Public Utilities Commission for deposit to the General Fund. Pacific shall remit fines to the Commission's Fiscal Office concurrently with the annual Advice Letter specified in Ordering Paragraph 6.

8. In any calendar year in which Pacific fails to meet the annual mean of 39.4 hours repeat out-of-service repair interval, Pacific shall be subject to a penalty of $300,000 for each month of the year in which the mean repeat out-of-service interval exceeds 39.4 hours. Such fine shall be payable to the California Public Utilities Commission for deposit to the General Fund. Pacific shall remit fines to the Commission's Fiscal Office concurrently with the annual advice letter specified in Ordering Paragraph 6.

9. If a catastrophic event or widespread service outage occurs in one or more months of the year, as part of its annual Advice Letter filing, Pacific shall provide both the unadjusted ARMIS average for the month and year, along with adjusted figures. Pacific shall provide supporting information as to why the month should be excluded for purpose of calculating penalties and workpapers that show the date(s) of the catastrophic event and how the adjusted figure was calculated.

10. The Telecommunications Division, or its successor, shall review Pacific's annual Advice Letter filing and make its recommendation as to whether we

should accept or reject Pacific's adjustments due to a catastrophic event or widespread service outage.

11. Pacific shall file a plan with the Directors of the Telecommunications Division and ORA detailing the steps it will take to meet the standards adopted herein for initial and repeat out-of-service repair intervals.

12. Pacific shall modify its Interactive Voice Response system to alert the caller before an appointment is made that a four-hour appointment is available, and provide an opportunity to request a four-hour appointment.

13. This case is closed.

This order is effective today.

Dated December 11, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners